IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 26

JOHN BURRELL GARNER, *et al.*, *Petitioners,*

—v.—

STATE OF LOUISIANA, *Respondent.*

No. 27

MARY BRISCOE, *et al.*, *Petitioners,*

—v.—

STATE OF LOUISIANA, *Respondent.*

No. 28

JANNETTE HOSTON, *et al.*, *Petitioners,*

—v.—

STATE OF LOUISIANA, *Respondent.*

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONERS

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Opinions Below

The brief opinions rendered in these cases by the Supreme Court of Louisiana, refusing petitioners' applications

for writs of certiorari, mandamus and prohibition, and finding no error in the rulings of law by the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, are not reported. These identical opinions are set out in each printed record (R. Garner 53; R. Briscoe 56; R. Hoston 55).

The "Findings of Guilt" by the Nineteenth Judicial District Court in the respective cases also appear in the printed records (R. Garner 37; R. Briscoe 38-39; R. Hoston 38-39).

Jurisdiction

The judgments of the Supreme Court of Louisiana in these cases were rendered on October 5, 1960. On March 20, 1961, this Court granted petitions for writs of certiorari to the Supreme Court of Louisiana, and ordered these cases consolidated for argument. The jurisdiction of this Court rests on 28 U. S. C. §1257(3).

Constitutional and Statutory Provisions Involved

1. The Fourteenth Amendment to the Constitution of the United States.

2. The Louisiana statutory provision involved is LSA-R.S. 14:103:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
>
> (1) Engaging in a fistic encounter; or
>
> (2) Using of any unnecessarily loud, offensive, or insulting language; or
>
> (3) Appearing in an intoxicated condition; or

(4) Engaging in any act in a violent and tumultuous manner by three or more persons; or

(5) Holding of an unlawful assembly; or

(6) Interruption of any lawful assembly of people; or

(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.

Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."

Questions Presented

1.

Whether conviction of petitioners for disturbing the peace, on the ground that their mere presence at counters reserved by custom for whites constitutes in itself such an offense, amounts to an unconstitutional enforcement of racial segregation by state power.

2.

Whether conviction of petitioners of disturbance of the peace, on records barren of evidence of present or threatened disturbance, deprived them of due process of law, in that they were convicted of a crime without evidence of guilt.

3.

Whether the application to petitioners of a statute setting highly vague standards of guilt deprived them of liberty without due process.

4.

Whether petitioners' constitutionally protected right to free expression was violated by the application to them of

the disturbance of the peace statute, under the circumstances of this case.

Statement

On March 29, 1960, petitioners in *Garner* (No. 26) entered Sitman's Drug Store, an establishment in Baton Rouge which served Negroes without discrimination at the counters in the drug store section and considered them "very good customers" (R. Garner 30, 32). They seated themselves at the lunch counter and one of them ordered coffee (R. Garner 30). The owner refused to serve them, but he neither requested them to move nor did he call the police (R. Garner 30-31). They were arrested by Captain Weiner (R. Garner 34), the arresting officer in all of these cases (see also R. Briscoe 34; R. Hoston 35). He had been summoned by the police officer on the beat (R. Garner 34), who made the call on his own initiative, without having received a complaint from any civilian (R. Garner 34-35). The arrests were made because petitioners "were sitting at a counter reserved for white people" and their "mere presence" there constituted a disturbance of the peace (R. Garner 35, 36).

In the *Briscoe* case (No. 27) petitioners sought service at a lunch counter at the Greyhound Bus Station in Baton Rouge on March 29, 1960 (R. Briscoe 30). The waitress told them "they would have to go on the other side to be served": "colored people are supposed to be on the other side" (R. Briscoe 30). When they "just kept sitting there" (R. Briscoe 31), and they "didn't do anything else" (R. Briscoe 33), a bus driver or "some woman" called the police department (R. Briscoe 33, 34). Captain Weiner responded to the call and "saw these people sitting at the lunch counter" (R. Briscoe 34). Forthwith, without having any conversation with the proprietors or employees, he asked these "stu-

dents" to move (R. Briscoe 36) and, when they didn't take this "opportunity to get up and leave" or "say anything" (R. Briscoe 35), he placed them under arrest because "They were disturbing the peace by the mere presence of their being there ['in the section reserved for white people' (R. Briscoe 36)]" (R. Briscoe 38).

Petitioners in the *Hoston* case (No. 28), on March 28, 1960, seated themselves as customers at a lunch counter at the S. H. Kress & Company in Baton Rouge (R. Hoston 29), a store which customarily allowed all white and colored customers to "make other purchases [save food] at the same counters at the same time" (R. Hoston 31). No signs indicated this, but the existence of this "custom" was communicated somehow to petitioners and other Negro students or customers by waitresses and stewards (R. Hoston 32). On this occasion, the waitress did not ask them to move, nor were they distinctly refused service; rather they were "offer[ed] service at the counter across the aisle" (R. Hoston 29, 32, 34). When petitioners "continued to sit", the store manager "advised the police department that they were seated at the counter reserved for whites, and within a short time the officers [Captain Weiner and Chief Arrighi (R. Hoston 35-36)] came in . . . and spoke to some of them" (R. Hoston 30). The officers "asked them to leave . . . the lunch counter reserved to white people. One of the [petitioners] said something about wanting to get a glass of tea but she was told they were disturbing the peace ['by sitting there' (R. Hoston 37)] and asked to leave again, and when none of them made a move to get up and leave Chief Arrighi told [Captain Weiner] to place them under arrest" (R. Hoston 36).

In each of these three cases, the information filed against petitioners indicated their race by adding "CM" or "CF" after their names (R. Garner 2; R. Briscoe 2; R. Hoston 2)

and charged that they "feloniously did unlawfully violated Article 103 (Section 7) of the Louisiana Criminal Code in that they refused to move from a cafe counter seat . . . after being requested to do so by the agent of [the establishment]; said conduct being in such a manner as to unreasonably and foreseeably disturb the public . . . " (R. Garner 1; R. Briscoe 1; R. Hoston 1).

Thereafter, following denials of their motions to quash and applications for writs of certiorari, mandamus and prohibition to review the denials of said motions (R. Garner 11-12, 25; R. Briscoe 11-12, 25; R. Hoston 10-11, 24), petitioners were tried and convicted in the Nineteenth Judicial District Court on June 2, 1960 (R. Garner 29, 37, 38; R. Briscoe 29, 38-39, 40-41; R. Hoston 28, 38-39, 40). On July 5, 1960, the trial court overruled petitioners' motions for new trials and sentenced each of them to 30 days in jail and to pay a fine of $100.00 and costs, or, in default of payment thereof, to 90 days in jail, with both parts of the jail sentence to run consecutively in the event of non-payment of the fine and costs (R. Garner 41-42; R. Briscoe 43-44; R. Hoston 43-44). Timely applications for a writ of certiorari, mandamus and prohibition made to the Supreme Court of Louisiana, inviting its supervisory jurisdiction to review the judgments and sentences entered against petitioners by the trial court, were refused in an opinion and judgment filed on October 5, 1960 (R. Garner 53; R. Briscoe 56; R. Hoston 55-56). At each stage of the proceedings in the Nineteenth Judicial District Court and the Supreme Court of Louisiana, petitioners objected to the criminal prosecutions on the ground that the same deprived them of privileges, immunities and liberties without due process of law as well as the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution (R. Garner 7, 14, 17, 23, 40, 43, 45-46, 51; R. Briscoe 8, 14, 16-17, 23,

42, 45, 47-48, 53-54; R. Hoston 7, 13, 15-16, 22, 42, 45, 47-48, 53-54). These constitutional objections, however, as aforeshown, were rejected at all stages of the litigations.

Summary of Argument

A.

These records show clearly that petitioners were convicted of not observing the custom of segregation. A change in name cannot make such a conviction less obnoxious to the equal protection clause of the Fourteenth Amendment. "State action" is present, both through police and court action and because the nominally "private" segregation that was in the background of these cases was followed in obedience to statewide custom which, for decades and continuously to the present, has been supported by official state law and policy.

B.

These petitioners were convicted of "disturbing the peace". But the records decisively establish that no disturbance of the peace either took place or was threatened, and that the actions of petitioners were in every respect decent and orderly. The only "disturbance" shown was the bare presence of petitioners in a place where Negroes were not "supposed" to be. Unless, therefore, the showing of this "presence" alone be held to support a finding of disturbance (and in that event Point A, *supra*, is clearly applicable), the petitioners have been convicted without any evidence of criminality—the most elementary denial of due process.

C.

The statute under which petitioners were convicted is too vague to set any standard for the guidance of persons sub-

ject to it, or of officials. Nothing in its history or in state judicial constructions clears up its ambiguities. It therefore fails to meet one of the most fundamental requirements of due process.

D.

The primary function of petitioners' conduct was that of expressing belief and of claiming what they conceived to be fair treatment. Such an expression enjoys federal constitutional protection. The state has infringed this right to free expression by punishing petitioners solely because of its exercise, without any valid state interest in such repression.

ARGUMENT

A. Petitioners were convicted on the theory that their failure to obey the custom of segregation was itself unlawful; their convictions therefore clearly contravene the decisions of this Court that racial segregation, enforced by state authority, violates the Fourteenth Amendment.

(1) Enforcement of segregation in these cases was both formally and substantially by "state action".

These cases on their own records present a very simple situation. Beyond doubt, Louisiana cannot make it a crime for a Negro to seek service at a counter reserved by custom for whites, for such a law is simply and solely a state law commanding segregation. *Gayle* v. *Browder*, 352 U. S. 903; *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54; *Holmes* v. *City of Atlanta*, 350 U. S. 879. But that is exactly what Louisiana has done in these cases. Very little skill in algebra is required to reach the conclusion that a law making a given action a "disturbance of the

peace", and then punishing this "disturbance of the peace", is the very same thing as a law punishing the same action under a more ingenuous nomenclature.

In each of these cases, the police and the state courts proceeded to arrest and conviction on the clear theory that the mere presence of a Negro at a "white" counter was unlawful in itself. This is enough to vitiate the convictions, though petitioners will shortly show (Point A(2), *infra*) that the same result must follow even if full account be taken of the nominally "private" segregation followed by the proprietors of the establishments concerned.

In the *Hoston* case (No. 28), the petitioners were charged with a disturbance of the peace "in that they refused to move from a cafe counter seat at Kress' Store . . . after having been ordered to do so by the agent of Kress' Store; . . ." But the transcript of testimony unequivocally and clearly shows, on the State's own testimony, that no such order was ever given. Mathews, the store manager, testified for the State on direct, that the petitioners sat next to him at the "white" counter, that they were denied service there, and were told they would be served at the "colored" counter. Then he testified as follows:

> Q. Were they requested to move over to the counter reserved for colored people? A. No, sir.
>
> Q. They weren't asked to go over there? A. They were advised that we would serve them over there (R. Hoston 29).

And again, on cross:

> A. As I stated before, we did not refuse to serve them. We merely advised them they would be served on the other side of the store (R. Hoston 33).

This is careful testimony; in the absence of anything tending to weaken it, it leaves it very clear that this manager followed a compromise course. He did not serve these petitioners, but did not tell them to move. The trial court, summing up this witness' testimony, shows clear appreciation of this distinction. Again on cross, the following was said:

> Q. Then why did you ask these defendants to move from this cafe counter?
>
> The Court: I think he hasn't testified to that. He said he advised them that they would be served elsewhere, over at the other counter. He said he did not refuse to serve them at this particular counter. What he did was, he advised them they would be served over at the other counter. . . . (R. Hoston 34)

When Capt. Weiner of the Baton Rouge City Police took the stand, the nature of the offense came clear. On direct:

> A. Chief Arrighi and I had gone to the store and we entered the store from the Main Street entrance which was the closest to the lunch counter, and we noticed several of these people sitting at the counter. Chief Arrighi proceeded to the counter where they were sitting and asked them to leave.
>
> Q. What counter were they seated at? A. They were seated at the lunch counter reserved for the white people. One of the defendants said something about wanting to get a glass of ice tea but she was told they were disturbing the peace and violating the law by sitting there and asked to leave again, and when none of them made a move to get up and leave Chief Arrighi told me to place them under arrest (R. Hoston 36).

And again on cross:

> Q. Do I take by that that they hadn't done anything other than sit at these particular cafe counter seats that you consider disturbing the peace? A. That's the only thing that I saw happen.
>
> • • • • •
>
> Q. How were they disturbing the peace? A. By sitting there.
>
> Q. By sitting there? A. That's right.
>
> • • • • •
>
> Q. It is your testimony their mere sitting there was disturbing the peace, is that right sir? A. That's right.
>
> Q. And that is because they were members of the negro race? A. That was because that place was reserved for white people (R. Hoston 37).

In its statement accompanying the finding of guilty, the trial court showed its clear appreciation of the nature of the offense:

> The Court: . . . they took seats at the lunch counter which by custom had been reserved for white people only. They were advised by an employee of that store, or by the manager, that they would be served over at the other counter which was reserved for colored people. They did not accept that invitation; they remained seated at the counter which by custom had been reserved for white people. The officers were called and the defendants continued to remain seated at this particular counter. That testimony is uncontradicted, and, in the opinion of the Court, the action of these accused on this occasion was a violation of Louisiana Revised Statutes, Title 14, Section 103, Article 7, in that the act in itself,

> their sitting there and refusing to leave when requested to, was an act which foreseeably could alarm and disturb the public, . . . (R. Hoston 38, 39)

Here, then, is the *Hoston* case: Petitioners, Negroes, were seated at a counter customarily frequented by whites. No private person told them to move or to leave. A policeman entered and told them to leave, on the ground that, *merely by being at the white counter,* they were "disturbing the peace." They remained, and were arrested and convicted of disturbance of the peace, on the ground, stated by the trial court, "that the *act in itself,* their sitting there and refusing to leave when requested to [by a policeman]" was such disturbance. (Emphasis supplied.)

This is simple and pure segregation by state power in the most classic sense, and it is nothing else. The state, acting throughout by its own formal agents, has ordained that it is a crime for a Negro to sit at a "white" counter, and then has tried the petitioners for that very crime, and convicted them.

The *Garner* case (No. 26) is similar. The information charged a disturbance of the peace, in that petitioners "refused to move from a cafe counter seat at Sitman's Drug Store . . . after having been ordered to do so by the agent of Sitman's Drug Store." Again, the record affirmatively shows, on the State's own uncontradicted testimony, that no such order was given. Willis, the drug store owner, testified:

> Q. Go ahead. A. They occupied two seats and their presence there caused me to approach them a short time later and advise them that we couldn't serve them, and I believe after that the police came and arrested them and took them away.
> [fol. 39] Q. Now, when you advised them you couldn't

serve them did they get up and leave or,— A. No, one asked for coffee,—said they just wanted coffee.

Q. That was after you told them you couldn't serve them? A. *That was the conversation they had with me.* I told them we couldn't serve them and one of the boys said he wanted some coffee (R. Garner 30). (Emphasis supplied.)

Willis did not call the police, but Captain Weiner was summoned, as he testified on direct for the State:

Q. Tell the Court exactly what was done? A. Well, I received a call at police headquarters from the officer on the beat, Officer Larsen. He told me that there were two negroes sitting at the lunch counter at Sitman's Drug Store. I told him to just stand by until we arrived at the scene. Major Bauer approached them and told them that they were violating the law by sitting there and asked them to leave. One of them mentioned something about an umbrella that he had bought and he couldn't see why he couldn't sit at the lunch counter. He told them again that they were violating the law and when they didn't make any effort to leave we placed them under arrest and brought them to police headquarters.

Q. Did you see Mr. Willis over there? A. No, I didn't see Mr. Willis. I'm assuming Mr. Willis is the manager, but we didn't talk to anyone in the place other than the two defendants (R. Garner 34).

The reason for the warning and arrest appears clearly in Weiner's testimony on cross:

Q. And when you arrived on the scene you saw these defendants sitting at this lunch counter? A. That's right.

Q. And based upon what you call a violation of the law you arrested them, is that correct? A. That's right (R. Garner 35).

• • • • • •

Q. Is it a fact that they were negroes that you arrested them? A. The fact that they were violating the law.

Q. In what way were they violating the law? A. By the fact that they were sitting at a counter that was reserved for white people.

• • • • •

Q. . . . Do you know positively that there is such a law? A. The fact that they were sitting there and in my opinion were disturbing the peace by their mere presence of being there I think was a violation of Act 103.

• • • • •

By Counsel Jones:

Q. The mere presence of these negro defendants sitting at this cafe counter seat reserved for white folks was violating the law, is that what you are saying? A. That's right, yes (R. Garner 35, 36).

Again, the trial court, in its remarks accompanying the finding of guilt, shows clear appreciation of the fact that the culpability of the petitioners had to rest on their mere failure to observe the custom of segregation:

> . . . these two accused were in this place of business on the date alleged in the bill of information, and they were seated at the lunch counter in a bay where food was served and they were not served while there, and officers were called and after the officers [fol. 47] arrived they informed these two accused that they would

> have to leave, and they refused to leave. Whereupon, the officers placed them under arrest for violating the law, specifically Title 14, Section 103, subsection 7. The Court is convinced beyond a reasonable doubt of the guilt of the accused from the evidence produced by the State, for the reason that in the opinion of the Court, the action and conduct of these two defendants on this occasion at that time and place was an act done in a manner calculated to, and actually did, unreasonably disturb and alarm the public (R. Garner 37).

This, again, is segregation by state power simpliciter, with only a change of name.

In the *Briscoe* case (No. 27), based on events occurring in the Greyhound Bus Station in Baton Rouge, the waitress who dealt with petitioners repeatedly testified, when not led, that what she told petitioners was that they would not be served unless they went over to the other side. On direct:

> Q. All right. Tell the judge what happened. A. They came in there and they sit down on the front seven seats and they start ordering and I told them they would have to go to the other side to be served. [fol. 39] Q. Why did you tell them that? A. Because we are supposed to refuse the service of anyone that is not supposed to be on that side (R. Briscoe 30).

This account of what she said is twice repeated (R. Briscoe 31, 33).

It is true that, in response to leading questions, this witness adopted, by short affirmative answers, a different mode of describing this same conversation, the tenor of which she had already given in her own words. On direct:

> Q. And you told them you couldn't serve them and asked them to move, is that correct? A. Yes, sir.

[fol. 40] Q. And when they refused to move you called the officers? A. Yes, sir (R. Briscoe 31).

And on cross:

Q. Miss Fletcher, is that the only reason you asked them to leave is because they were Negroes? A. Yes, sir (R. Briscoe 31).

But it is evident that she is referring to the same utterance, which she thrice describes in her own words as a statement to petitioners that "they would have to go to the other side to be served." This is not an order to leave, or indeed to do anything.

When Captain Weiner enters, the true nature of the complaint against these petitioners comes clear. Succinctly:

By Counselor Jones:

Q. You requested them to move then because they were colored, is that right, sitting in those seats? A. We requested them to move because they were disturbing the peace.

Q. In what way were they disturbing the peace? A. *By the mere presence of their being there* (R. Briscoe 38). (Emphasis supplied.)

In this case, the trial court, in its "Finding", predicated guilt both upon the waitress' "request" that the petitioners "leave" (cf. the analysis of her testimony, above) and the police request of the same tenor. These ingredients are intermixed in indeterminable proportions. This Court may independently evaluate the waitress' testimony as support for the trial court's finding of a "request" on her part. *Norris* v. *Alabama*, 294 U. S. 587, *Napue* v. *Illinois*, 360 U. S. 264, 272. But even if such a "request" be granted, and given the force of an order, it remains unquestionable that,

on the trial court's own statement, an ingredient[1] in the guilt of these petitioners was their sitting at a "white" counter after the agents of the State had determined that they were not to sit at the "white" counter—pure segregation by state power.

The record shows no consequential relation between the waitress' "request to leave" (if that was ever given), and the parallel request on the part of the police. Captain Weiner testified:

> Q. Officer, you testified that they were seated at this cafe counter seat in the section or the side that was reserved for white, is that correct? A. That's right.
>
> Q. Now, how did you know that this particular side in which they were sitting was reserved for whites? A. Well, it is pretty obvious from the people there.
>
> • • • • •
>
> Q. Why did you arrest them, officer? A. Because according to the law, in my opinion, they were disturbing the peace.
>
> • • • • •
>
> Q. What was your answer to that officer? A. That in my opinion they were disturbing the peace.
>
> Q. Within your opinion. Explain your opinion. A. The fact that their presence was there in the section

[1] "[I]f one of the grounds for conviction is invalid under the Federal Constitution, the conviction cannot be sustained." *Williams* v. *North Carolina*, 317 U. S. 287, 292. *Stromberg* v. *California*, 283 U. S. 359, 370. The trier of fact in the present case had to make a whole judgment—whether the conduct of petitioners in all its bearing and under all the circumstances, met the very general standards of §14:103(7). His findings tell us that he took into account their failure to leave when ordered by the police, pure state agents. We know from the companion cases, where this is the whole of the basis for conviction, that this was a significant and highly material factor. It is mixed in this case in indeterminable proportions with the other factor referred to—failure to obey the waitress' supposed "request"—and affects the whole conviction.

reserved for white people, I felt that they were disturbing the peace of the community (R. Briscoe 36).

This testimony makes it entirely clear that the police, in enforcing segregation in this case, were acting on their own responsibility and judgment as public agents of the state within the scope of their authority.

In these three cases, then, we have to do with the enforcement of segregation as a state policy having the force of law, by agents of the state. As petitioner will later show more at large (Point B, *infra*) there is not the ghost of evidence, in any of these cases, of any breach of the peace, or any threat of disturbance, other than such as might be inferred from the mere fact that petitioners were not observing the custom of segregation. Even if the records contained such a showing, it would be of no avail, for the outlawing of segregation by the Fourteenth Amendment is of course a rejection of all the reasons why segregation might be thought good, including the fear of disorder. *Buchanan* v. *Warley*, 245 U. S. 60; *Cooper* v. *Aaron*, 358 U. S. 1. But there is nothing of that tenor to consider. These petitioners, in everything but name, were convicted of the simple offense of not following the custom of segregation, and their convictions cannot be sustained without sustaining segregation by the direct force of state law and authority.

(2) Even if it be urged that there is in these cases a relevant component of formally "private" action, that action is substantially infected with state power. "Private" segregation in these cases was in obedience to a statewide custom, which in turn has long enjoyed the support of Louisiana as a polity.

In the preceding Point, A(1), petitioners have urged that these cases on their own records present no novel questions of "state action", since the enforcement of obedience

to the custom of segregation was the work throughout of formal agencies of the state. It is true, however, that a formally "private" pattern of segregation is in the background of each case, even though, as shown above, no right of private property was distinctly asserted or claimed, and the connection between the "private" pattern and the independent police and judicial action remains vague.

If it be thought that this vague connection between the action of private proprietors and the actions of the State suffices to put in issue the question whether these "private" patterns of segregation were themselves infected with state power, then petitioners contend that that question must be answered in the affirmative.

To begin, the "property" interest of these proprietors was an exceedingly narrow one. In each case, petitioners were not only "invited" but welcomed as cash customers on the premises, everywhere but at the lunch counters. The "property" right at stake was simply the right to segregate. These establishments—a busy drug store, a large department store, a bus terminal restaurant—are a part of the public life of Baton Rouge. The subjection of their policies to constitutional control raises no real issues of individual privacy or freedom of association. *Munn* v. *Illinois*, 94 U. S. 113; *Marsh* v. *Alabama*, 326 U. S. 501.

It is against this background that the "state action" question here must be set. And it ought further to be noted that the "state action" doctrine has proven far from satisfactory as a guide among the pervasive realities of state power intermixed in nominally "private" activities widely affecting public life. The basic trouble is adumbrated in the *Civil Rights Cases* opinion itself, where it is laid down that "some" state action is enough, 109 U. S. 3, 13; since total absence of state involvement rarely if every occurs in matters of public importance, the "state action" doctrine was

from its inception certain to create vast problems. It is far from clear, moreover, that "state" action must always be "political" action; "custom" is mentioned in the *Civil Rights* opinion as one of the forms of state action, 109 U. S. 17, and it may be that this rests on a conception of the "State" as a community, acting through firm customs as well as by formal law. Even verbally, "state action" may not be a validly inferred requirement in equal protection cases, for denial of protection can be accomplished by inaction as well as by action, and in many cases the proper question may be not whether the state has "acted", but whether it has failed to act when it should have done so.

The late Judge Learned Hand, writing on a question of constitutional construction, said that ". . . for centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand . . ." Hand, *The Bill of Rights*, p. 14. Where formally "'private" actions would defeat the constitutional objectives of equality and freedom in the public life, this principle surely has some applicability. Cf. *Terry* v. *Adams*, 345 U. S. 461.

But in these cases the State of Louisiana is so intimately involved, even in the formally "private" segregation pattern followed by these proprietors, that we need not reach these ultimate problems.

The intervention of police in support of the segregation pattern, and the invocation of the criminal prosecution machinery, are the immediate and obvious state involvements. "Whether the statute book of the State actually laid down any such rule . . ., the State, through its officers, enforced such a rule; . . ." *Civil Rights Cases, supra*, 109 U. S. at 15. But the deeper involvement of Louisiana arises from two facts: (1) These proprietors, in segregating, were not

acting on whim, or in obedience to personal taste as to association, but were following a custom that characterizes Louisiana as a community; (2) the maintenance of this custom, by law and other official action, is the policy of Louisiana as a political body.

The only rational or imaginable ground for the "private" segregation followed by these proprietors was obedience to state custom. Though this background fact is assumed rather than explicitly stated in testimony, its presence in the background can be inferred from these records, if such support be thought necessary in regard to a matter of such common knowledge. In *Hoston,* Kress, a nationwide chain which as a matter of common knowledge does not segregate outside the South, is found segregating; the manager testified that he feared a disturbance if petitioners sat in the white section, "Because it isn't customary for the two races to sit together and eat together" (R. Hoston 30). In *Garner,* the owner testified that he *could not* serve Negroes because he had "facilities for only the one race"—a statement which makes sense only against the background of the assumption that Negroes and whites are by custom not to be served together (R. Garner 30, 31). In *Briscoe,* we have to do with the terminal of a national bus company; the facilities of such an enterprise are, as a matter of common knowledge, segregated only in states where such segregation is customary. The interventions of the police in these cases were obviously based on their knowledge of the customary character of this segregation. There is not a scintilla of evidence to rebut the inference that the segregation practiced by these proprietors was a direct consequence, and indeed a part, of the Louisiana custom of public segregation of the races.

The State of Louisiana *as a community* was thus indispensably involved in this segregation pattern. But Lou-

isiana *as a polity* is in the same causal chain of involvement, for the State has given to the segregation custom the full support of state law and policy.

There is even good historic ground for the belief that the segregation system, of which the segregation followed as a "custom" in these cases is a part, was brought into being, or at least given firm lines in its inception, by state law. Woodward, *The Strange Career of Jim Crow*, Oxford University Press (1957) 15-25, 81-87, ". . . [S]tateways, apparently changed the folkways," *id.* at 92.

Louisiana has long maintained a system of segregation by law. A joint resolution of the legislature in 1960 has recently restated the official policy of the state.

> "WHEREAS, Louisiana has always maintained a policy of segregation of the races, and WHEREAS, it is the intention of the citizens of this sovereign state that such a policy be continued." Acts 1960, No. 630.

In his inaugural address the present Governor succinctly stated the policy of the State: "We will maintain segregation." New Orleans Times-Picayune, May 11, 1960, p. 2, Sec. 3, col. 1-7.

It is true that Louisiana's segregation laws, as such, are no longer enforceable *de jure*. In view of the utterances just quoted, the importance of this fact is hard to evaluate. But in any case it could not break the casual nexus between state support of the custom of segregation and the prevalence of that custom. Effects outlive their causes, but do not thereby cease to be effects of those causes.

Louisiana has a law, passed in 1956, making it a crime to permit mixed white and Negro dancing, social functions, entertainments, "and other such activities involving personal and social contacts" (LSA-R.S. 4:451, Acts 1956,

No. 579). It is uncertain whether the quoted phrase makes it generally unlawful for whites and Negroes to eat together; certainly it would seem to make it unlawful for them to eat together under many circumstances. But this point need not be resolved. For segregation is a *system* rather than a series of isolated provisions. And a State which enacts that whites and Negroes may not eat together on the job or use the same sanitary facilities (LSA-R.S. 23:971-972), go to prison together (LSA-R.S. 15:752), buy a ticket at the same window (LSA-R.S. 4:5), wait in a station together (LSA-R.S. 45:1301-1305), go to a public park or other public recreational facility together (LSA-R.S. 33:4558:1), marry one another (LSA-R.S. 14:79) or even advocate integration, if they are employed in the school system (LSA-R.S. 17:493, 17:523, 17:443, 17:462)—is at least making it vastly more likely that the general custom of segregation will be observed. (The foregoing sampling is of laws currently in force, save as to constitutionality; of course Louisiana has until recently had and enforced segregation laws as to transportation, etc., and the causal effect of these in creating and supporting the interconnected segregation system seems clear, as brought out above.)

The formally "private" segregation practiced in these cases is therefore unbreakably connected with state law, for it is the creature of state custom, and the support of that custom is itself the keystone policy of Louisiana as a political entity. This course of action is not only touched by but permeated with the power of the state.

If the element of "private" choice be thought material on these records, petitioners insist that the quantum and kind of genuine "private" choice in this pattern is negligible, a mere bridge from statewide custom, fostered by state law and policy, into the state criminal machinery. No private interest of these proprietors is at stake, other than the gain

they may look to from following the state-fostered segregation custom. On any view, "state action" permeates the whole pattern. A contrary holding would turn upside down the criterion of the *Civil Rights Cases*, for it would have to rest on the proposition that action is "private" unless it is wholly public—that any small component of nominally "private" choice robs a public pattern of its public character.

B. Petitioners' convictions denied due process of law, in that they rested on no evidence of an essential element of the crime.

Louisiana Revised Statutes 14:103, under which petitioners were convicted, reads, in relevant part:

> "disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
>
> • • • • •
>
> (7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

(Petitioners' conviction was had under subsection (7), evidently the only one which could conceivably apply to them.)

In each case, the information contained substantially the following allegation:

> ". . . said conduct being in such a manner as to unreasonably and foreseeably disturb the public. . . "

In each of the cases, the "Finding of Guilt" contains a recital corresponding (roughly, and with variations, see *infra* p. 26) to these allegations.

Thus the State of Louisiana formally recognized at every crucial stage that (as indeed is patent as the statute's face) a conviction can be had under the statute only on a finding and a showing that the conduct complained of was performed, in the words of the informations, "in such manner as to unreasonably and foreseeably disturb the public."

There is no evidence in any of the records that this conduct bore any such character. There is much in these records, on the other hand, that tends strongly to rebut the hypothesis.

In the *Garner* case, the owner of the store had received no complaints, and did not summon the police (R. Garner 33, 31). The police witness, Captain Weiner, when asked the general question "Tell the Court exactly what was done?" described a scene of profound peace. He knew of no complaints (R. Garner 34). The rest of his testimony contains no hint of an actual, threatened, or even anticipated breach of the peace. Yet he was being examined on direct by a prosecutor whose duty it was to show through this experienced witness, if he could, that this indispensable element of the crime was present. On cross the questions of counsel repeatedly sought, and never received, something other than the "mere presence" of these Negroes as a ground for the arrest.

In *Briscoe*, again, the waitress' testimony contains no hint of anything other than an occasion profoundly peaceful in its surrounding circumstances. She gave no evidence of so much as grumbling on the part of anyone. Her refusal to serve petitioners was based *solely* on their race *in itself* (R. Briscoe 32). Captain Weiner, again (though with every reason to allude to circumstances of disorder or threatened disorder if they were present) describes a peaceful scene, and gives "the mere presence of their being

there" as the sole factor constituting a breach of the peace (R. Briscoe 38).

In *Hoston*, the situation described in the testimony is one containing no elements of present or threatened disturbance. The manager, it is true, "feared" a disturbance, but he "feared" it, as he testified, solely because "it isn't customary for the two races to sit together and eat together" (R. Hoston 30). The imminence in his mind of what he "feared" may be assessed by his distinct testimony that he did not even ask the petitioners to move (*id* at 34). Weiner's testimony, again, distinctly negates any factor of disturbance of the peace, other than "their mere sitting there" (*id* at 37).

It is on this evidence, and nothing else, that the trial judge made the findings, indispensable under the statute, that "the conduct of the defendants on this occasion at that time and place was an act done in a manner calculated to, *and actually did*, unreasonably disturb and alarm the public" (R. Garner 37, emphasis added), that "their actions in that regard in the opinion of the Court was an act on their part as would unreasonably disturb and alarm the public" (R. Briscoe 39), that the same conduct "was an act which foreseeably *could* alarm and disturb the public. . . ." (R. Hoston 39, emphasis added). These findings, essential to conviction under the statute, are unsupported by evidence, and a conviction without evidence of guilt is the most elementary possible denial of due process. *Thompson* v. *Louisville*, 362 U. S. 199.

Since the trial court jumped this gap merely by using conclusory language, and since the State Supreme Court's brief opinion sheds no light on the problem, it is hard to make out on what theory the state courts considered that petitioners could be convicted on testimony so palpably not containing evidence of an essential element of guilt. The

only reasoned utterance of any organ of the State of Louisiana on this question is found in the State's *Brief in Opposition to Petition for Writ of Certiorari,* filed in this case. On pp. 11-13 of that document the thought is developed that petitioners, having access to newspapers and having lived in Baton Rouge, should have known that their actions were likely to produce trouble, and that they were not welcome.

The first of these points goes pretty far. It amounts, for the purposes of these cases, to an assertion that the formation of mobs to attack peacefully protesting Negroes is so expectable a phenomenon in Louisiana that the trial judge, absent any support in the record, must be assumed to have taken judicial notice, *sub silentio,* not only of the likelihood of such trouble but also of the petitioners' knowledge of that likelihood. In the absence of any assertion to this effect by any court in Louisiana, it would be going pretty far for this Court to supply the clear defect of these records by an assumption so gratuitously insulting to the people of Louisiana. Disturbances there have been, in Louisiana as elsewhere, but nothing has yet happened to make it suitable for this Court to assume a position so hopeless.

But even if this assumption be made, the sole upshot, in application to the facts of these cases, is that public protest may be anticipated where Negroes sit with whites, and that fear is not on any view a sufficient ground for state support of segregation. *Buchanan* v. *Warley,* 245 U. S. 60; *Cooper* v. *Aaron,* 358 U. S. 1.

As to petitioners' imputed knowledge, suggested by the *Brief in Opposition,* that they were "not welcome", it is to be observed, first, that this falls far short of proving a threat to the peace, or a public disturbance or alarm. More fundamentally, this argument ignores the essence of the sit-in demonstration, which is addressed to the conscience

and to the self-interest of the proprietor. Petitioners may have guessed or known they were "not welcome", in the sense that the proprietors of these stores would rather the whole thing had never come up; but the whole point of the demonstrations was that petitioners wanted to try whether, by solemn protest, they could *gain* the "welcome" —in the cash-nexus sense in which that word may meaningfully here be used—to which they believed themselves morally entitled. Again, the austere utterances of the state courts give no guidance; it is asking a great deal of this Court to ask it to supply the deficiency of these records by guesses as to the degree of "unwelcome" felt by these proprietors, and the connection of that, in turn, with a foreseeable tendency of petitioners' actions unreasonably to "disturb and alarm" the public.

These are speculations, justified only by the corresponding speculations in the *Brief in Opposition*. The hard fact remains that these records are fatally defective as a matter of the simplest due process, for they contain no evidence of an essential element of the crime charged. *Thompson* v. *Louisville, supra.*

C. Petitioners were convicted of a crime under the provisions of a state statute which, as applied to their acts, is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment.

The requirement of civilized law with respect to clarity of the commands in criminal statutes has never been better stated than by the Louisiana Supreme Court:

> ". . . it is well-settled that no act or conduct, however reprehensible, is a crime in Louisiana, unless it is defined and made a crime clearly and unmistakably by statute." *State* v. *Sanford*, 203 La. 961, 970, 14 So. 2d 778, 781 (1943).

This requirement, as a minimum component in our concepts of ordered liberty, *Palko* v. *Conn.*, 302 U. S. 319, 325, is an indispensable ingredient of due process of law under the Fourteenth Amendment. *Lanzetta* v. *New Jersey*, 306 U. S. 451.

On its face and as applied, this statute entirely fails to meet this test. To begin with, all seven of the categories of offenses proscribed are subject, by the introductory clause, to the overriding requirement that the act be done "in such a manner as would foreseeably disturb or alarm the public." Presumably this language embodies some limitation; not every "fisticuff", not every "interruption of any lawful assembly of people," is an offense, but only such as is "done" in the proscribed "manner." But what is the scope and tenor of this limitation? Does the introductory language refer (as it seems to, in the use of the phrase "in such a manner") to some aggravated characteristic of the act itself? Or does it refer (as seems more natural where "foreseeability" is at stake) to the surrounding circumstances?

"Foreseeability", moreover, is in criminal law and in the law of private obligations usually a criterion of responsibility for what actually takes place; to speak of the "foreseeability" of what never happened is at the least a bit unusual. Does this language, then, limit criminal responsibility to the case where the public disturbance and alarm actually take place, *and* where these might have been "foreseen"? That is the construction suggested by the phrase being defined, "disturbing the peace", for the conclusion goes down hard that "disturbing the peace" can be found to have occurred when the peace is not actually disturbed. Yet the mind remains unsatisfied that this limited construction was (or was not) the one in the legislative mind.

When we get to the very subsection under which these petitioners were charged, a puzzling partial redundancy occurs. The requirement of a connection with public disturbance and alarm is reiterated, though under a different verbal form. The act proscribed by (7) must be committed "in such a manner as to unreasonably disturb or alarm the public." Does this "as to" look toward actual result or does it refer to tendency? Both usages are normal English.

The requirement of foreseeability moreover, dropped out in the special definition of (7), though it doubtless still rides through from the introductory phrase. Does this mean that the actual consequence of public disturbance must be present under (7), while foreseeable tendency to disturbance is enough, say, to bring a "fisticuff" under the statutory ban?

Finally, is the rule *eiusdem generis* applicable to (7)? The other actions prohibited by (1)-(6) are all to some degree disorderly or blameworthy in themselves. Does this limitation subsist as to (7)? Or does the subsection really penalize "any other act" if its further vague criteria are met? (Subsection (4) of this same section penalizes "three or more persons" for any "act" done in a "violent and tumultuous manner"; is it reasonable to suppose that subsection (7) was meant to penalize acts by any number of persons done in a non-violent manner?)

These multifarious indeterminacies, impossible of resolution save by fiat, function in series with the almost total vagueness of each word in the phrase "unreasonably disturb or alarm the public."

The Louisiana Criminal Code contains directions for its own interpretation, but these help very little, or even tend to establish that the application of §14:103(7) to petitioners would contravene the canons of construction ordained. For example:

LSA-A.R. 14:3—Interpretation of Criminal Code.

> "... all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."

The "context" in which §14:103(7) occurs is mainly or entirely one of violence or indecency *in the proscribed action itself*, a characteristic entirely missing in these cases. In LSA-R.S. 14:8, it is enacted that:

> Criminal conduct consists of an act or failure to act which produces criminal consequences.

This would tend to suggest that the actual ensuing of disturbance is a defining character of an offense under §14:103 (7). The main thrust of these passages, however, is their confirming of the vagueness of §14:103(7).

The Louisiana Legislature must have been doubtful whether §14:103(7) could apply to peaceful sit ins, for an elaborate new §14:103.1, added by Acts 1960, No. 69, §1, provides, among other things that:

> "A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:
>
> ... (4) refuses to leave the premises of another when requested so to do by any owner, lessee or any employee thereof, shall be guilty of disturbing the peace.

And Act 1960, No. 77, amending LSA-R.S. 14:56, added to the categories of "criminal mischief" a new one:

"(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

As petitioners have already shown, even these new sections would not apply to them because they were not ordered to leave. (*Supra*, Point A(1), *passim*). But the fact that the legislature conceived it necessary to spell out even this more concrete offense in new legislation makes it most unlikely that any clear command was thought to be embodied in §14:103(7), forbidding the less definite offense of simply being where Negroes are not "supposed" to be.

The introductory part of the new §14:103.1, quoted above, also shows a contrast with the attempted definitions in §14:103(7) "Intent to provoke a breach of the peace", and "circumstances such that a breach of the peace may be occasioned thereby", are far from precise in their reference. But at least it is made clear that either the state of mind of the actor or the potentialities in the situation are being referred to. By contrast, in our §14:103(7), as is shown above, it is impossible even to be sure what the field of reference is.

Prior Louisiana statutes and decisional law are not helpful. The leading case under a prior act roughly similar to §14:103 was *State* v. *Sanford*, 203 La. 961, 14 So. 2d 778 (1943). Defendants, Jehovah's Witnesses were convicted under the phrase " . . . who shall do any other act, in a manner calculated to disturb or alarm the inhabitants . . . or persons present . . . " Acts 1934 No. 227, §1. Their "act" was being in town and handing out magazines after city officials had warned them that their "presence" might cause

trouble. Reversing the convictions, the Supreme Court of Louisiana said:

> "... the defendants went about their religious missionary and evangelistic work in an orderly, peaceful and quiet way and did not demand or insist that the persons approached either listen to them or make a contribution. Briefly, their acts and conduct were lawful and orderly and did not tend to cause a disturbance of the peace. The Mayor and the Chief of Police had no legal right to insist that these defendants forego either their religious beliefs and works, or remain away from the town, as long as they conducted themselves in a lawful and orderly manner. . . . " 203 La. 961, 967, 14 So. 2d 778, 780.

This language seems to make the orderly character of the defendants' own actions a defining characteristic of nonculpability. In *Town of Ponchatoula* v. *Bates*, 173 La. 824, at 827-828, 138 So. 851 at 852 (1931), the same court upholding as against a vagueness claim a town ordinance making it a crime to "engage in a fight or in any manner disturb the Peace," said:

> "It was not necessary that the ordinance define the offense for the reason that no better definition for the offense could be found than that contained in the ordinance itself. To disturb means to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet. . . . A disturbance of the peace may be created by any act or conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary, normal temperament. Such acts to come

within the purview of the ordinance must be voluntary, unnecessary, and outside or beyond the ordinary course of human conduct."

Here the criterion of *actual result* is obviously in the court's mind.

In *State* v. *Truby*, 211 La. 178 at 184, 192, 29 So. 2d 758 at 759, 762 (1947) the same court, interpreting a "disorderly place" statute (LSA-R.S. §14:104) said:

> "It is so well settled that citation of authority is unnecessary that in Louisiana there are no common-law crimes, and that nothing is a crime which is not made so by statute . . . . [A] penal statute must be strictly construed and cannot be extended to cases not included within the clear import of its language, and . . . nothing is a crime which is not *clearly and unmistakably* made a crime." (Emphasis added.)

Nothing in any of the above decisions has the slightest tendency to bring the petitioners' conduct "clearly and unmistakably" under §14:103(7).

Section 14:103(7), then, is not a warning to the public. It is not a guide to policemen or to courts. It says nothing except perhaps "You'd better watch out," or "Bad actions are to be punished." The legislature, in language impossible of rational construction, has simply furnished a means of convicting those whom it seems desirable to convict.

It is unnecessary to consider how much curative power might have resided in a firm and intelligible judicial construction, channeling the sprawl of these words into permissibly narrow grounds, for, as these cases illustrate, confusion is worse confounded in the application of the statute to petitioners. In its Findings of Guilt, the trial

court used three different formulae, one for each case, though the problem was exactly the same in all. In Garner, the act of the petitioners was said to be "an act done in a manner calculated to, and actually did, unreasonably disturb and alarm the public" (R. Garner 37). (These references to manner and calculation, and to actual result, are, of course, in the teeth of the evidence; see Point B, *supra.*) In *Briscoe,* the very same conduct is said to be "an act on their part as would unreasonably disturb or alarm the public" (R. Briscoe 39). In *Hoston,* it "was an act which foreseeably could alarm and disturb the public" (R. Hoston 39). It would be tedious and unneedful to subject these utterances to narrow verbal criticism; the least that can be said of them is that they bring no clarity whatever to the total ambiguity and vagueness of the statute.

The brief opinion of the Supreme Court of Louisiana casts no light on any of these questions. The testimony in these cases, as shown *supra* under Point B, has no tendency to connect these petitioners in any way to public disturbance or alarm—whether by way of their intent, or of their foreknowledge, or of actual result, or of probable result. It remains entirely unclear, therefore, how this statute could possibly apply to them.

It is impossible to imagine any statute more pressingly calling for clarity than 14:103(7), for that subsection, on its face, makes criminal any act performable by man, so long as it meets the other tests of the subsection and of the section as a whole. That these tests are not tests at all, but merely a sort of automatic writing putting entire discretion into the hands of the police, has already been shown. This Court has never had under its hand a statute more obnoxious to the due process requirement of definiteness, nor one which reached further into the whole lives of those subject to it.

D. The decision below conflicts with the Fourteenth Amendment, in that it unwarrantedly penalized petitioners for the exercise of their freedom of expression.

There could be no serious doubt that petitioners, in peacefully taking their places at the "white" counters, were solemnly expressing their belief that they were morally entitled to be treated on terms of full equality by the establishments that solicited and enjoyed their patronage at other counters. Such a non-verbal expression on a matter of solemn moment is in every way equivalent to speech, and is entitled to constitutional protection. *Stromberg* v. *California,* 283 U. S. 359, *Thornhill* v. *Alabama,* 310 U. S. 88. It is entirely immaterial at this point whether they had a legal or constitutional right to enjoy unsegregated service; what is at issue here is something quite different, their right to indicate their conviction that in fairness they should be served. Their expression was completely peaceful, and was exactly adapted to time and place.

Nor is there, in these cases, any problem of the accommodation between private property rights and the right to free expression, cf. *Marsh* v. *Alabama,* 326 U. S. 501, for these petitioners were not convicted, in name or in substance, for trespass, but solely for being in a place reserved by custom for whites. This has already been conclusively shown, under Point A, *supra.*

We have to do then with a very clear suppression and penalization of expression, by state authority. This fact necessitates a reiteration of Point C, *supra,* in a context which deeply intensifies its impact. The statute invoked in this case is, as shown under Point C, *supra,* so vague and uncertain as to offend against due process, when considered simply as a criminal statute. When it is applied, as here, to the suppression of constitutionally protected utterance, its unacceptability is even more plain. It is,

in fact, in the field of free expression that this Court has most vigorously applied the rule against vagueness. *Smith* v. *California*, 361 U. S. 147, 151; *Winters* v. *New York*, 333 U. S. 507, 517-18; see Mr. Justice Frankfurter, concurring in *Burstyn* v. *Wilson*, 343 U. S. 495, 533.

No valid state interest appears in this case to overbalance the extremely weighty Fourteenth Amendment interest in personal freedom of expression. The state interest in the preservation of the peace can have no application to these records, for they fail to show, or even to hint, that a breach of the peace was threatened. This has been fully shown under Point B, *supra*. In this connection, *Feiner* v. *New York*, 340 U. S. 315, and *Terminiello* v. *Chicago*, 337 U. S. 1, may be adverted to, not for their specific holdings, nor for selection among the divergent views expressed in the opinions, but for exhibiting that the debatable ground, on the present point, is miles away from the terrain occupied by the cases here at bar. In *Feiner*, there was some evidence at least of actual danger of outbreak at the very time and place concerned. In *Terminiello*, a situation fraught with imminent possibility of violence was shown to exist. In both *Feiner* and *Terminiello*, moreover, the expressions themselves were intrinsically provocative. In our cases, the whole situation exhibited by these records is one of peaceful conduct on petitioners' part, and peaceful surroundings.

The only "breach of the peace" interest the State arguably had in these cases rested on the remote and inferential possibility, undeveloped in the records or in any judicial utterance below, that somebody might later get ungovernably upset at what petitioners were doing. To sustain these convictions on such a ground would amount to no less than holding that free utterance may be suppressed as a breach of the peace, if it can be guessed that public disagreement with the utterance may be in-

tense. This would be simply the abolition of the guarantee of free expression in America.

The other assertable state interest implemented by these convictions is the interest (abundantly evidenced in the case of Louisiana) in the maintenance of segregation. But this interest can have no constitutional standing, for it takes effect only (as here) as a form of the use of state power to support segregation.

In the aspect now under scrutiny, then, these cases constitute state suppression of expression, under a statute maximally vague, and with no state interest appearing.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the court below should be reversed.

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